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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
(HONORABLE JEFFREY T. MILLER)

UNITED STATES OF AMERICA,

Plaintiff,

V.

MANLEY SMITH (2),

Defendant.

Case No.: 08cr1969-JM

Date: July 25, 2008

Time: 11:00 a.m.

**NOTICE OF MOTIONS AND  
MOTIONS TO:**

- (1) PRESERVE AND INSPECT EVIDENCE;**
- (2) COMPEL DISCOVERY;**
- (3) COMPEL NOTICE PURSUANT TO  
FED. R. CRIM. P. 12(b)(4)(B);**
- (4) DISMISS INDICTMENT DUE TO  
MISINSTRUCTION OF GRAND JURY;  
AND,**
- (5) GRANT LEAVE TO FILE FURTHER  
MOTIONS**

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY; AND  
MARK CONOVER, ASSISTANT UNITED STATES ATTORNEY;

**PLEASE TAKE NOTICE** that on July 25, 2008, at 11:00 a.m., or as soon thereafter as counsel may be heard, the accused, Manley Smith, by and through his attorneys, Jason I. Ser and Federal Defenders of San Diego, Inc., will ask this Court to enter an order granting the motions outlined below.

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**MOTIONS**

Defendant, Mr. Smith, by and through his attorneys, Jason I. Ser and Federal Defenders of San Diego, Inc., pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law and local rules, hereby moves this Court for an order to:

- (1) Preserve and Inspect Evidence;
- (2) Compel Discovery;
- (3) Compel Notice Pursuant to FED. R. CRIM. P. 12(b)(4)(B);
- (4) Dismiss Indictment Due to Misinstruction of Grand Jury; and,
- (5) Grant Leave to File Further Motions.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, and any and all other materials that may come to this Court's attention at or before the time of the hearing on these motions.

Respectfully submitted,

DATED: July 15, 2008

/s/ Jason I. Ser  
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Federal Defenders of San Diego, Inc.  
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Defendant.

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**STATEMENT OF FACTS AND POINTS AND  
AUTHORITIES IN SUPPORT OF MOTIONS**

**I.**

**STATEMENT OF FACTS<sup>1</sup>**

The probable cause statement alleges that on, May 30, 2008, Wackenhut Transportation Officer Vincent Reyes reported his belief that co-defendant Christopher Saint-Lucero (Saint) was involved in alien smuggling. Officer Reyes claimed Saint stated he had done so approximately 10 times. Based upon Officer Reyes' report, the San Diego Sector Smuggling Interdiction Group (SIG) commenced an investigation.

On June 1, 2008, SIG Agent Manny Ortiz (Ortiz) posed as one Alberto Rodriguez-Osegueda, who was identified as a purported Mexican citizen. Ortiz was placed into a holding cell at the Chula Vista Border Patrol Station, along with William Edgardo Romero-Estrada (Romero), who was processed as one

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<sup>1</sup> The following statement of facts is based on the probable cause statement attached to the complaint in this case. **The government has not produced any discovery to date.** Accordingly, the facts alleged in these motions are subject to elaboration and/or modification at the time these motions are heard. Mr. Smith reserves the right to take a position contrary to the following statement of facts at the motions hearing and at trial.

1 Juan Carlos Barrientos-Estrada, a Mexican citizen processed for voluntary return. Romero, however, was  
2 a citizen of El Salvador and alleged undocumented. Ortiz and Romero, along with 5 other unknown  
3 Mexican nationals, were listed on Form I-216 (Record of Departure) for deportation/removal to Mexico.

4 At approximately 11:00 a.m., Saint loaded Ortiz and Romero (and possibly the other 5 individuals)  
5 into a bus for transport to the San Ysidro port of entry to effect their physical deportation/removal. At the  
6 gate into Mexico, Mexican immigration officials interviewed the deportees, including Ortiz and Romero,  
7 each of whom declared El Salvadorian citizenship. Transportation Officer Otha Hayes, who was working  
8 with Saint, separated Ortiz and Romero from the remaining deportees.

9 At some unknown time while still at the port of entry, Ortiz asked Saint to give "them a break."  
10 Saint asked if "they" had any money, handcuffed Ortiz and Romero and placed them back on the bus. On  
11 the bus, Saint asked where Ortiz and Romero where they were going. Ortiz and Romero stated they were  
12 going to Los Angeles. Again, Saint asked if they had money. Ortiz answered in the negative, while Romero  
13 claimed he was to have paid \$3,000 for his smuggling. Ortiz then stated he could pay \$1,000. Saint told  
14 them he was going to make a call, and used a Nextel telephone to contact some unknown individual.

15 Thereafter, Officer Hayes returned to the bus. Saint told him he intended to transport Ortiz and  
16 Romero via marked Wackenhut vehicle to the original Border Patrol station in which they were processed.  
17 Saint ordered Hayes not to ask and just to do. Officer Hayes drove the bus to the Chula Vista Border Patrol  
18 compound and stopped at the station's gasoline pumps.

19 At the time of arrival, a marked Wackenhut jeep pulled in behind the bus. Saint ordered Officer  
20 Hayes to stop the bus and exited. He contacted Mr. Smith, who had been driving the jeep. After speaking  
21 briefly, he returned to the bus, told Officer Hayes to take a break, and ordered Ortiz and Romero to exit the  
22 bus and get into the jeep. While in the jeep, Saint allegedly told Mr. Smith "\$5,000 bucks" and Mr. Smith  
23 purportedly responded by stating he had his car at the station and could take them or stash them until later.  
24 Saint told Mr. Smith to get his car. Saint then indicated he would drop them off and for Mr. Smith to call  
25 him later. Mr. Smith drove the jeep to his car and exited.

26 Saint drove the jeep out of the compound to Howard Lane Neighborhood Park, where he dropped  
27 them off with orders to wait for him. Saint explained he would call his brother-in-law to pick them up and  
28 that Ortiz and Romero would call their families about payment arrangements once in Los Angeles. During

1 this time, various Border Patrol agents conducted surveillance of the area. Approximately one hour later,  
2 Saint returned to the park driving a black Toyota Tundra and made eye-contact with Ortiz, but drove away.  
3 He returned minutes later in the same vehicle, parked and requested Ortiz and Romero to come to the truck.  
4 Ortiz opened the rear door of the truck and, along with Romero, entered it. At this time, Ortiz identified  
5 himself as a federal agent and arrested Saint.

6 At approximately 1:45 p.m., Ortiz and other agents arrested Mr. Smith at the Wackenhut office at  
7 the Border Patrol station. While escorting Mr. Smith for processing subsequent to his arrest, Mr. Smith  
8 allegedly stated "Oh I know what this is about, I know now."

9 At some unknown time after arrest, agents advised Mr. Smith of his rights pursuant to Miranda v.  
10 Arizona, 384 U.S. 436 (1966). Mr. Smith purportedly waived his rights and made statements in response  
11 to questioning by the agents.

12 On June 13, 2008, Mr. Smith was charged by a grand jury in an indictment with violating 8 U.S.C.  
13 §§ 1324(a)(1)(A)(ii), (a)(1)(B)(I), and (v)(II) - Transportation of Illegal Aliens for Financial Gain and  
14 Aiding and Abetting. He pled not guilty to this charge.

## 15 II.

### 16 MOTION TO PRESERVE AND INSPECT EVIDENCE

17 Mr. Smith requests the preservation of all physical evidence in this case. This includes any evidence  
18 that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government (or  
19 its private contractors) in this case. See United States v. Riley, 189 F.3d 802, 806-808 (9th Cir.1999). This  
20 request includes, but is not limited to: (1) the defendant's personal effects; (2) personal effects belonging  
21 to any of the material witnesses related to this case, including any papers and telephones; (3) the vehicle(s)  
22 allegedly involved; (4) any videotapes capturing Mr. Smith or any third party in relation to this case,  
23 including any surveillance footage; (5) any recorded communications made by government or non-  
24 government officials related to the above captioned case, e.g., surveillance recordings, Wackenhut radio  
25 communications, or 911/dispatch tapes; and, (6) any other evidence seized from the defendant or any third  
26 party in relation to this case. This request also includes any material or percipient witnesses who might be  
27 deported or otherwise likely to become unavailable (e.g. undocumented aliens and transients). Mr. Smith  
28

1 requests that government counsel be ordered to notify the agencies and private contractors with custody of  
2 such evidence be informed of the Court's preservation order.

3 Further, Mr. Smith requests an order granting defense counsel and/or their investigators access to  
4 the location where the alleged offense took place (under supervision/escorted if necessary), i.e., Chula Vista  
5 Border Patrol compound, the vehicles involved and other case-related evidence for the purposes of  
6 investigation, including inspection, and photographing. Fed. R. Crim. P. 16(a)(1)(E). A proposed Order  
7 is attached for the convenience of the Court.

8 Mr. Smith requests that the evidence in the case be preserved throughout the pendency of the case,  
9 including any appeals.

### 10 III.

#### 11 MOTION TO COMPEL DISCOVERY

12 Mr. Smith moves for the production of the following discovery. This request is not limited to those  
13 items that the prosecutor knows of, but rather includes all discovery listed below that is in the custody,  
14 control, care, or knowledge of any "closely related investigative [or other] agencies." See United States v.  
15 Bryan, 868 F.2d 1032 (9th Cir.), cert. denied, 493 U.S. 858 (1989).

16 (1) The Defendant's Statements. The Government must disclose to the defendant all copies of any  
17 written or recorded statements made by the defendant; the substance of any statements made by the  
18 defendant which the Government intends to offer in evidence at trial; any response by the defendant to  
19 interrogation; any written summaries of the defendant's oral statements contained in the handwritten notes  
20 of the Government agent(s) as well as any reports containing such; any response to any Miranda warnings  
21 which may have been given to the defendant; as well as any other statements by the defendant. Fed. R.  
22 Crim. P. 16(a)(1)(A)-(B). The Advisory Committee Notes and the 1991 amendments to Rule 16 make clear  
23 that the Government must reveal all the defendant's statements, whether oral or written, regardless of  
24 whether the government intends to make any use of those statements.

25 (2) Arrest Reports, Notes and Dispatch Tapes. The defendant also specifically requests the  
26 Government to turn over all arrest reports, notes, dispatch or any other tapes, and TECS records that relate  
27 to the circumstances surrounding his arrest or any questioning. This request includes, but is not limited to,  
28 any rough notes, records, reports, transcripts or other documents in which statements of the defendant or

1 any other discoverable material is contained. Such material is discoverable under Fed. R. Crim. P.  
2 16(a)(1)(A)-(B) and Brady v. Maryland, 373 U.S. 83 (1963). The Government must produce arrest reports,  
3 investigator's notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution  
4 reports pertaining to the defendant. See Fed. R. Crim. P. 16(a)(1)(A) and (B), Fed. R. Crim. P. 26.2 and  
5 12(h).

6 (3) Brady Material. The defendant requests all documents, statements, agents' reports, and tangible  
7 evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the  
8 Government's case. Under Brady, impeachment as well as exculpatory evidence falls within the definition  
9 of evidence favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs,  
10 427 U.S. 97 (1976).

11 (4) Any Information That May Result in a Lower Sentence Under The Guidelines. The Government  
12 must produce this information under Brady v. Maryland, 373 U.S. 83 (1963). This request includes any  
13 cooperation or attempted cooperation by the defendant as well as any information that could affect any base  
14 offense level or specific offense characteristic under Chapter Two of the Guidelines. The defendant also  
15 requests any information relevant to a Chapter Three adjustment, a determination of the defendant's criminal  
16 history, and information relevant to any other application of the Guidelines.

17 (5) The Defendant's Prior Record. The defendant requests disclosure of his prior record. Fed. R.  
18 Crim. P. 16(a)(1)(D).

19 (6) Any Proposed 404(b) Evidence. The government must produce evidence of prior similar acts  
20 under Fed. R. Crim. P. 16(a)(1)(D) and Fed. R. Evid. 404(b) and 609. In addition, under Rule 404(b), "upon  
21 request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the  
22 general nature . . ." of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at  
23 trial. The defendant requests that such notice be given three (3) weeks before trial in order to give the  
24 defense time to adequately investigate and prepare for trial.

25 (7) Evidence Seized. The defendant requests production of evidence seized as a result of any  
26 search, either warrantless or with a warrant. Fed. R. Crim. P. 16(a)(1)(E).

27 (8) Tangible Objects. The defendant requests the opportunity to inspect and copy as well as test,  
28 if necessary, all other documents and tangible objects, including photographs, books, papers, documents,

1 fingerprint analyses, vehicles, or copies of portions thereof, which are material to the defense or intended  
2 for use in the Government's case-in-chief or were obtained from or belong to the defendant. Fed. R. Crim.  
3 P. 16(a)(1)(E).

4 (9) Evidence of Bias or Motive to Lie. The defendant requests any evidence that any prospective  
5 Government witness is biased or prejudiced against the defendant, or has a motive to falsify or distort his  
6 or his testimony.

7 (10) Impeachment Evidence. The defendant requests any evidence that any prospective  
8 Government witness has engaged in any criminal act whether or not resulting in a conviction and whether  
9 any witness has made a statement favorable to the defendant. See Fed R. Evid. 608, 609 and 613; Brady  
10 v. Maryland, supra.

11 (11) Evidence of Criminal Investigation of Any Government Witness. The defendant requests any  
12 evidence that any prospective witness is under investigation by federal, state or local authorities for any  
13 criminal conduct.

14 (12) Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling. The  
15 defense requests any evidence, including any medical or psychiatric report or evaluation, that tends to show  
16 that any prospective witness' ability to perceive, remember, communicate, or tell the truth is impaired, and  
17 any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an  
18 alcoholic.

19 (13) Witness Addresses. The defendant requests the name and last known address of each  
20 prospective Government witness. The defendant also requests the name and last known address of every  
21 witness to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will  
22 not be called as a Government witness.

23 (14) Name of Witnesses Favorable to the Defendant. The defendant requests the name of any  
24 witness who made an arguably favorable statement concerning the defendant or who could not identify him  
25 who was unsure of his identity, or participation in the crime charged.

26 (15) Statements Relevant to the Defense. The defendant requests disclosure of any statement  
27 relevant to any possible defense or contention that he might assert.  
28



1 (16) Jencks Act Material. The defendant requests production in advance of trial of all material,  
2 including dispatch tapes, which the government must produce pursuant to the Jencks Act, 18 U.S.C. § 3500.  
3 Advance production will avoid the possibility of delay at the request of defendant to investigate the Jencks  
4 material. A verbal acknowledgment that “rough” notes constitute an accurate account of the witness’  
5 interview is sufficient for the report or notes to qualify as a statement under § 3500(e)(1). Campbell v.  
6 United States, 373 U.S. 487, 490-92 (1963). In United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991) the  
7 Ninth Circuit held that when an agent goes over interview notes with the subject of the interview the notes  
8 are then subject to the Jencks Act.

9 (17) Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the defendant  
10 requests all statements and/or promises, express or implied, made to any Government witnesses, in exchange  
11 for their testimony in this case, and all other information which could arguably be used for the impeachment  
12 of any Government witnesses.

13 (18) Agreements Between the Government and Witnesses. The defendant requests discovery  
14 regarding any express or implicit promise, understanding, offer of immunity, of past, present, or future  
15 compensation, or any other kind of agreement or understanding, including any implicit understanding  
16 relating to criminal or civil income tax, forfeiture or fine liability, between any prospective Government  
17 witness and the Government (federal, state and/or local). This request also includes any discussion with a  
18 potential witness about or advice concerning any contemplated prosecution, or any possible plea bargain,  
19 even if no bargain was made, or the advice not followed.

20 (19) Informants and Cooperating Witnesses. The defendant requests disclosure of the names and  
21 addresses of all informants or cooperating witnesses used or to be used in this case, and in particular,  
22 disclosure of any informant who was a percipient witness in this case or otherwise participated in the crime  
23 charged against Mr. Smith. The Government must disclose the informant’s identity and location, as well  
24 as disclose the existence of any other percipient witness unknown or unknowable to the defense. Roviaro  
25 v. United States, 353 U.S. 53, 61-62 (1957). The Government must disclose any information derived from  
26 informants which exculpates or tends to exculpate the defendant.

27 (20) Bias by Informants or Cooperating Witnesses. The defendant requests disclosure of any  
28 information indicating bias on the part of any informant or cooperating witness. Giglio v. United States,

1 405 U.S. 150 (1972). Such information would include what, if any, inducements, favors, payments or  
2 threats were made to the witness to secure cooperation with the authorities.

3 (21) Government Examination of Law Enforcement Personnel Files. Mr. Smith requests that the  
4 Government examine the personnel files and any other files within its custody, care or control, or which  
5 could be obtained by the government, for all testifying witnesses, including testifying officers. Mr. Smith  
6 requests that these files be reviewed by the Government attorney for evidence of perjurious conduct or other  
7 like dishonesty, or any other material relevant to impeachment, or any information that is exculpatory,  
8 pursuant to its duty under United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). The obligation to  
9 examine files arises by virtue of the defense making a demand for their review: the Ninth Circuit in  
10 Henthorn remanded for in camera review of the agents' files because the government failed to examine the  
11 files of agents who testified at trial. This Court should therefore order the Government to review all such  
12 files for all testifying witnesses and turn over any material relevant to impeachment or that is exculpatory  
13 to Mr. Smith prior to trial. Mr. Smith specifically requests that the prosecutor, not the law enforcement  
14 officers, review the files in this case. The duty to review the files, under Henthorn, should be the  
15 prosecutor's. Only the prosecutor has the legal knowledge and ethical obligations to fully comply with this  
16 request.

17 (22) Expert Summaries. Defendant requests written summaries of all expert testimony that the  
18 government intends to present under Federal Rules of Evidence 702, 703 or 705 during its case in chief,  
19 written summaries of the bases for each expert's opinion, and written summaries of the experts'  
20 qualifications. Fed. R. Crim. P. 16(a)(1)(F). This request includes, but is not limited to, fingerprint expert  
21 testimony.

22 (23) Residual Request. Mr. Smith intends by this discovery motion to invoke his rights to discovery  
23 to the fullest extent possible under the Federal Rules of Criminal Procedure and the Constitution and laws  
24 of the United States. This request specifically includes all subsections of Rule 16. Mr. Smith requests that  
25 the Government provide him and his attorney with the above requested material sufficiently in advance of  
26 trial to avoid unnecessary delay prior to cross-examination.

## IV.

**COMPEL NOTICE PURSUANT TO FED. R. CRIM. P. 12(b)(4)(B)**

Mr. Smith hereby invokes his procedural rights pursuant FED. R. CRIM. P. 12(b)(4)(B) and moves for an order to compel notice by the government of its intention to use in its case in chief at trial any evidence which Mr. Smith may be entitled to discover under Rule 16 of the FED. R. CRIM. P.

This Rule reads in pertinent part:

(4) Notice of the Government's Intent to Use Evidence.

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(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

FED. R. CRIM. P. 12(b)(4)(B). Rule 12(b)(4)(B) "provides a mechanism for insuring that a defendant knows of the government's intention to use evidence to which the defendant may want to object" so that the defendant may "avoid the necessity of moving to suppress evidence which the government does not intend to use."<sup>2</sup> FED. R. CRIM. P. 12 advisory committee note to 1974 amendment; see also 1 Charles A. Wright, Federal Practice and Procedure: Criminal § 197, at 735 (2d ed.1982) (Rule 12(d) "is intended to facilitate the making of a pretrial motion for suppression of evidence."); United States v. Jordan, No. 3:06-CR-102, 2007 WL 1849985, at \*3 (E.D. Tenn. June 5, 2007) ("Rule 12(b)(4)(B) is intended to facilitate the making of pretrial suppression motions by allowing the defendant to avoid filing a motion to suppress when the government does not intend to use the evidence"); United States v. Anderson, 416 F. Supp. 2d 110, 112 (D.C. Cir. Feb. 23, 2006) (same) (quoting FED. R. CRIM. P. 12 advisory committee note to 1974 amendment).

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<sup>2</sup> Government violations of Rule 12(b)(4)(B) should excuse a defendant's failure to move to suppress evidence prior to trial, as required by Rule 12(b)(3), because defendants have no incentive to move to suppress evidence that the government will not be introducing. See United States v. Poole, 794 F.2d 462, 464 n. 1 (9th Cir.1986) (excusing the defendant's failure to move to suppress evidence prior to trial since the government had not warned the defendant that the evidence would be used); FED. R. CRIM. P. 12(e) ("A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.").

Thus, Rule 12(d) aids defendants in complying with their Rule 12(b)(3) obligation to make motions to suppress evidence prior to trial. This in turn preserves the integrity of a trial by not interrupting it with suppression motions. See FED. R. CRIM. P. 12 advisory committee's note (Rule 12(b)(3) "'is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt'") (quoting Jones v. United States, 362 U.S. 257, 264, 80 S. Ct. 725, 732, 4 L. Ed. 2d 697 (1960) (emphasis eliminated)).

United States v. de la Cruz-Paulino, 61 F.3d 986, 993-94 (1st Cir. 1995).

The amendments proposed by the Supreme Court and permitted by Congress to take effect beginning in 1975 show that compliance with such a defense request is mandatory and does not require any court action: "the government, either on its own or in response to a request by the defendant, *must* notify the defendant of its intent to use certain evidence in order to give the defendant an opportunity before trial to move to suppress that evidence." FED. R. CRIM. P. 12 advisory committee note to 1975 amendment, Notes of the Committee on the Judiciary to 1975 Enactment, Amendments Proposed by the Supreme Court, H.R. Rep. No. 94-247 (emphasis added); see also FED. R. CRIM. P. 12 advisory committee note to 2002 amendment (in explaining renumbering and reorganization of subparts of the Rule, stating that "[t]he Committee believed that [old Rule 12(d)], which addresses the government's *requirement* to disclose discoverable information for the purpose of facilitating timely defense objections and motions, was more appropriately associated with the pretrial motions specified in Rule 12(b)(3).") (emphasis added); United States v. Holmes, No. 07-CR-104, 2007 WL 2900438, at \*2 (E.D. Wis. 2007) ("Rule 12(b)(4)(B), like FED. R. EVID. 404(b), entitles the defendant to certain information upon request; no court order or intervention is required"); United States v. Anderson, 416 F.Supp. 2d at 112 (discussing 1975 amendment to FED. R. CRIM. P. 12); United States v. Norman, No. 05-CR-30015-DRH-4, 2005 WL 2739082, at \*2 (S.D. Ill. Oct. 24, 2005) ("the government is obligated to comply with both Rule 16 and Rule 12(b)(4)(B)."). The government's "duty to disclose [under Rule 12(b)(4)(B)] is a continuing one, and any 'arguably' suppressible evidence coming into its possession after its initial discovery disclosures must be disclosed as soon as practicable." United States v. Kimble, No. CR 106-156, 2007 WL 1430303, \*2 (S.D. Ga. May 10, 2007).

"The notice required by the language of the rule is notice of what, if any, of the Rule 16 evidence that a defendant is entitled to receive will be used at trial; evidence that is not subject to Rule 16 disclosure, is not subject to the notice requirement of Rule 12(b)(4)(B)." United States v. Cheatham, 500 F. Supp. 2d 528, 534 (W.D. Pa. 2007) (citing United States v. Fischbach and Moore, Inc., 576 F.Supp. 1384, 1396-1397

(W.D. Pa. 1983) (discussing Federal Rule of Criminal Procedure 12(d)(2), now Federal Rule of Criminal Procedure 12(b)(4)(B)).

It is clear that what the government is required to disclose early on in the pendency of the case is evidence gathered from searches and seizures including electronic monitoring, and statements and confessions, all of which may be subject to suppression upon motion by Defendant. In essence the Rule requires the government to make early disclosure of these matters to allow the Court to determine any suppression motions prior to trial thereby avoiding needless delay during trial.

Kimble, 2007 WL 1430303, at \*2. It should also be noted that when the government has an open file policy with regard to its prosecution, this policy does not comply with Rule 12(b)(4)(B) "because it does not specify which evidence the government intends to use at trial." Cruz-Paulino, 61 F.3d at 993 (citing United States v. Brock, 863 F. Supp. 851, 868 (E.D. Wis. 1994); Anderson, 416 F. Supp. 2d at 112, n. 1 ("Simply complying with an open file policy is insufficient to satisfy Rule 12(b)(4)(B) because merely making discovery available for inspection does not inform a defendant upon what evidence the government intends to rely") (citing Brock, 863 F. Supp. at 868; United States v. Kelley, 120 F.R.D. 103, 107 (E.D. Wis.1988)). In Cruz-Paulino, the First Circuit explained:

"To the extent that the government's open files contain information that is subject to Rule 16 discovery, Rule 12(d)(2) creates a notice requirement. The open file policy does not, in and of itself, satisfy this notice requirement because it does not specify which evidence the government intends to use at trial." Providing open-file discovery does not satisfy Rule 12(d)(2) because "the defendant is still 'left in the dark' as to exactly what evidence, discoverable under Rule 16, the government intends to rely upon in its case in chief at trial."

61 F.3d at 993 (citations omitted). The district court in Anderson similarly explained:

Defendant's entitlement under Rule 12(b)(4)(B), then, is clear: of the material seized from [the defendant], the government must notify defendant of the evidence that it intends to use in its case-in-chief-that is, the evidence that will appear on the government's exhibit list for trial.

Anderson, 416 F. Supp. 2d at 112. Thus, mere disclosure of discovery to the defense pursuant to Rule 16 is insufficient notice pursuant to Rule 12(b)(4)(B) of what the government intends to use in its case in chief at trial.<sup>3</sup>

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<sup>3</sup> Also, although Rule 12(b)(4)(B) speaks only of evidence that the government intends to use in its case-in-chief, federal courts have the inherent authority to require the government to give notice of such evidence that the government intends to use in rebuttal or otherwise. See United States v. Richter, 488

Accordingly, Mr. Smith requests that any evidence or information that falls within Rule 12(b)(4)(B) be specifically identified from among the items of other discovery that will be produced pursuant to Rule 16. It is not the intent or purpose of Rule 12(b)(4)(B) that the government simply reply that its Rule 12(b)(4)(B) evidence is contained "somewhere" within the mass of discovery items provided under Rule 16. Specific identification of Rule 12(b)(4)(B) evidence is essential to enable counsel to prepare effectively, to conserve judicial time and resources, and if appropriate, to afford an opportunity to move to suppress.

Mr. Smith also asks the Court to require the government to file a Rule 12(b)(4)(B) notice some reasonable time prior to the defense's deadline to file appropriate motions under Rule 12(b)(3)(C) and that, if necessary, the defendant be permitted an extension of the motions deadline to file motions to exclude the proffered evidence from admission at trial.<sup>4</sup>

## V.

### **MOTION TO DISMISS THE INDICTMENT DUE TO MISINSTRUCTION OF THE GRAND JURY**

Mr. Smith moves to dismiss the Indictment due to misinstruction of the July 2007 Grand Jury. Mr. Smith's arguments are essentially those set out in Judge Hawkins' dissent in United States v. Marcucci, 299 F.3d 1156 (9th Cir. 2002), cert. denied, 1538 U.S. 934 (2003) and Judge Kozinski's dissent in United States v. Navarro-Vargas, 367 F.3d 896 (9th Cir. 2004), opinion vacated by and en banc review granted by United States v. Navarro-Vargas, 367 F.3d 920 (9th Cir. 2004), and he incorporates those arguments by reference. See Reporter's Partial Transcript of the Proceedings (Instructions), dated July 26, 2007 (Exhibit A hereto).

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F.2d 170, 173-74 (9th Cir. 1973). Such notice is required to "protect[] the trial from error and enable[] the defense at the most appropriate time to obtain a ruling on the usability by the prosecution of important evidence." Battle v. United States, 345 F.2d 438, 440 (D.C. Cir. 1965).

<sup>4</sup> The Court has significant latitude in fashioning the mechanism by which such disclosure must occur. According to the advisory committee notes to the 1974 amendment to Rule 12, "[n]o sanction is provided for the government's failure to comply with the court's order because the committee believes that attorneys for the government will in fact comply and that *judges have ways of insuring compliance*." FED. R. CRIM. P. 12, advisory committee notes to 1974 amendment (emphasis added).



**INDEX OF EXHIBITS**

United States v. Manley Smith

Case No. 08cr1969-JM

Page

Reporter's Partial Transcript of the Proceedings, July 26, 2007 (Exhibit A) ..... 1



# **EXHIBIT A**

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA  
3  
4

5 IN RE: THE IMPANELMENT )  
6 OF GRAND JURY PANELS 07-3 AND )  
7 07-4 )  
8 )  
9 )  
10 )

11 BEFORE THE HONORABLE LARRY ALAN BURNS  
12 UNITED STATES DISTRICT JUDGE  
13

14 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
15 THURSDAY, JULY 26, 2007  
16  
17  
18  
19  
20

21 COURT REPORTER:

22 EVA OEMICK  
23 OFFICIAL COURT REPORTER  
24 UNITED STATES COURTHOUSE  
25 940 FRONT STREET, STE. 2190  
SAN DIEGO, CA 92101  
TEL: (619) 615-3103

1 SAN DIEGO, CALIFORNIA - THURSDAY, JULY 27, 2007 - 9:00 A.M.

2 MR. HAMRICK: I WOULD ASK BOTH PANELS TO RISE AND  
3 EVERYONE ELSE WILL BE CONSIDERED AN ALTERNATE. EVERYONE WILL  
4 TAKE THE OATH OF GRAND JURY SERVICE.

5 IF YOU WOULD PLEASE RAISE YOUR RIGHT HAND AND  
6 RESPOND "I DO" AT THE END.

7 DO YOU, AND EACH OF YOU, SOLEMNLY SWEAR OR AFFIRM  
8 THAT YOU SHALL DILIGENTLY INQUIRE INTO AND MAKE TRUE  
9 PRESENTMENT OR INDICTMENT OF ALL MATTERS AND THINGS AS SHALL  
10 BE GIVEN TO YOU IN CHARGE OR OTHERWISE COME TO YOUR KNOWLEDGE,  
11 TOUCHING YOUR GRAND JURY SERVICE; TO KEEP SECRET THE COUNSEL  
12 OF THE UNITED STATES, YOUR FELLOWS AND YOURSELVES; NOT TO  
13 PRESENT OR INDICT ANY PERSON THROUGH HATRED, MALICE OR ILL  
14 WILL; NOR LEAVE ANY PERSON UNREPRESENTED OR UNINDICTED THROUGH  
15 FEAR, FAVOR, OR AFFECTION, NOR FOR ANY REWARD, OR HOPE OR  
16 PROMISE THEREOF; BUT IN ALL YOUR PRESENTMENTS AND INDICTMENTS  
17 TO PRESENT THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE  
18 TRUTH, TO THE BEST OF YOUR SKILL AND UNDERSTANDING?

19 IF SO, ANSWER, "I DO."

20 THE COURT: NOW THAT I'VE IMPANELED AND SWORN YOU AS  
21 GRAND JURORS, IT'S THE COURT'S RESPONSIBILITY TO INSTRUCT YOU  
22 ON THE LAW WHICH SHOULD GOVERN YOUR ACTIONS AND YOUR  
23 DELIBERATIONS AS GRAND JURORS.

24 THE FRAMERS OF OUR FEDERAL CONSTITUTION THOUGHT THAT  
25 THE GRAND JURY WAS SO IMPORTANT TO THE ADMINISTRATION OF

1 JUSTICE THAT THEY INCLUDED A PROVISION FOR THE GRAND JURY IN  
2 THE BILL OF RIGHTS. THE 5TH AMENDMENT TO THE U.S.  
3 CONSTITUTION PROVIDES, IN PART, THAT NO PERSON SHALL BE HELD  
4 TO ANSWER FOR A CAPITAL OR OTHERWISE INFAMOUS CRIME WITHOUT  
5 ACTION BY A GRAND JURY. AN INFAMOUS CRIME MEANS A SERIOUS  
6 CRIME WHICH MAY BE PUNISHABLE BY IMPRISONMENT OF MORE THAN A  
7 YEAR.

8 THE PURPOSE OF THE GRAND JURY IS TO DETERMINE  
9 WHETHER THERE IS ENOUGH EVIDENCE TO JUSTIFY A FORMAL  
10 ACCUSATION AGAINST A PERSON; THAT IS, AS YOU'VE HEARD ME SAY,  
11 TO DETERMINE WHETHER THERE'S PROBABLE CAUSE TO BELIEVE THAT  
12 THE PERSON COMMITTED A CRIME.

13 IF LAW ENFORCEMENT OFFICIALS WERE NOT REQUIRED TO  
14 SUBMIT TO AN IMPARTIAL GRAND JURY PROOF OF GUILT AS TO A  
15 PROPOSED CHARGE AGAINST A PERSON SUSPECTED OF HAVING COMMITTED  
16 A CRIMINAL, THEN THEY WOULD BE FREE TO ARREST SUSPECTS AND  
17 BRING THE SUSPECTS TO TRIAL NO MATTER HOW LITTLE EVIDENCE  
18 EXISTED TO SUPPORT THE CHARGE.

19 THE GRAND JURY IS AN INDEPENDENT BODY. IT DOESN'T  
20 BELONG TO ANY BRANCH OF GOVERNMENT. AS MEMBERS OF THE GRAND  
21 JURY, NOW YOU, IN A VERY REAL SENSE, STAND BETWEEN THE  
22 GOVERNMENT AND THE PERSON BEING INVESTIGATE BY THE GOVERNMENT.

23 A GRAND JURY MUST NEVER BE MADE AN INSTRUMENT OF  
24 PRIVATE PREJUDICE OR VENGEANCE OR MALICE. INSTEAD, IT'S YOUR  
25 DUTY TO SEE TO IT THAT INDICTMENTS ARE RETURNED ONLY AGAINST

1 THOSE WHO YOU FIND PROBABLE CAUSE TO BELIEVE ARE GUILTY OF A  
2 CRIME AND TO SEE TO THAT THE INNOCENT ARE NOT COMPELLED TO GO  
3 TO TRIAL. YOU'LL REMEMBER MY COMMENTS AND EXPLANATION ON  
4 THAT. THE POWER TO INDICT IS THE POWER TO RUIN SOMEBODY.

5 A MEMBER OF A GRAND JURY WHO IS RELATED BY BLOOD OR  
6 MARRIAGE TO A PERSON UNDER INVESTIGATION OR WHO KNOWS THAT  
7 PERSON WELL ENOUGH TO HAVE A BIASED STATE OF MIND OR IS BIASED  
8 FOR ANY OTHER REASON SHOULD NOT PARTICIPATE IN THE  
9 INVESTIGATION OF THAT PERSON OR IN THE RETURN OF AN  
10 INDICTMENT.

11 WHAT THIS MEANS MORE GENERALLY IS IF YOU'RE  
12 PERSONALLY ACQUAINTED AND HAD A PERSONAL VIEWPOINT ON SOME  
13 MATTER PRESENTED TO THE GRAND JURY, YOU SHOULD IDENTIFY THAT  
14 TO THE ASSISTANT UNITED STATES ATTORNEY WHO'S PRESENTING THE  
15 CASE AND SHOULD CONSIDER WHETHER YOUR FRAME OF MIND IS SUCH  
16 THAT YOU SHOULD NOT PARTICIPATE IN THE DELIBERATION OF THAT  
17 PARTICULAR MATTER.

18 THIS DOESN'T MEAN THAT IF YOU HAVE AN OPINION, YOU  
19 SHOULDN'T PARTICIPATE IN THE INVESTIGATION. WHAT IT DOES MEAN  
20 IS THAT IF YOU HAVE A FIXED OPINION BEFORE YOU HEAR ANY  
21 EVIDENCE, EITHER A BIAS AGAINST OR A FRIENDSHIP THAT WOULD  
22 CAUSE YOU TO FAVOR SOMEONE OR ILL WILL OR SOME OTHER  
23 MOTIVATION, THEN YOU SHOULDN'T PARTICIPATE IN THAT  
24 INVESTIGATION OR IN VOTING ON THAT PARTICULAR INDICTMENT.

25 GRAND JURIES CONSIST OF 23 MEMBERS, AND 16 OF THE 23

1 MUST BE PRESENT IN ORDER FOR THERE TO BE A QUORUM; THAT IS, IN  
2 ORDER FOR THE GRAND JURY TO FUNCTION AND DO ITS WORK. IT'S  
3 REQUIRED THAT A MINIMUM OF 16 GRAND JURORS BE PRESENT. IF  
4 FEWER THAN THAT NUMBER ARE PRESENT EVEN FOR A MOMENT, THEN THE  
5 PROCEEDINGS OF THE GRAND JURY HAVE TO STOP UNTIL AT LEAST 16  
6 ARE PRESENT.

7 AS GRAND JURORS YOU HAVE EXTENSIVE POWERS, BUT  
8 THEY'RE LIMITED IN SOME IMPORTANT RESPECTS. I'LL GO OVER  
9 THOSE WITH YOU NOW.

10 FIRST, YOU CAN ONLY INVESTIGATE CONDUCT THAT  
11 VIOLATES THE FEDERAL CRIMINAL LAWS. YOU'RE IN, AFTER ALL,  
12 FEDERAL COURT, AND YOU'RE IMPANELED AS A FEDERAL GRAND JURY.  
13 CRIMINAL ACTIVITY THAT VIOLATES STATE LAWS IS OUTSIDE OF YOUR  
14 INQUIRY, AND IT'S OUTSIDE OF YOUR DISCRETION. HAVING SAID  
15 THAT, SOMETIMES THE SAME CONDUCT VIOLATES BOTH FEDERAL AND  
16 STATE LAW. AND IF THAT'S THE CASE, THEN YOU MAY PROPERLY  
17 CONSIDER THAT CONDUCT.

18 THERE'S ALSO A GEOGRAPHIC LIMITATION ON THE SCOPE OF  
19 YOUR INQUIRIES IN EXERCISING YOUR POWER. YOU MAY INQUIRE ONLY  
20 TO FEDERAL OFFENSES COMMITTED IN THIS DISTRICT. WHAT THAT  
21 MEANS IS THE CASES PRESENTED TO YOU WILL ARISE HERE HAVING --  
22 THE INCIDENTS HAVING ARISEN HERE IN THE COUNTY OF SAN DIEGO OR  
23 THE COUNTY OF IMPERIAL. YOU'RE NOT AUTHORIZED TO INVESTIGATE  
24 MATTERS THAT OCCUR OUTSIDE THIS DISTRICT.

25 NOW, LET ME ADD ANOTHER WRINKLE TO THAT.

1 OCCASIONALLY, ACTIONS OR ACTIVITIES THAT TAKE PLACE  
2 HERE ALSO AFFECT OTHER DISTRICTS OR OTHER PARTS OF THE  
3 COUNTRY. MANY OF THE FEDERAL LAWS YOU LOOK AT HAVE AN  
4 INTERSTATE CONNECTION, SOMEBODY SENDING MAIL OR USING A WIRE.  
5 SO IT MAY WELL BE THAT YOU HAVE EVIDENCE OF CRIMINAL ACTIVITY  
6 OCCURRING IN OTHER DISTRICTS, BUT WHAT'S IMPORTANT IS THAT  
7 THERE ALWAYS BE A TIE INTO THIS DISTRICT; THAT SOMETHING  
8 HAPPENED THAT THE GOVERNMENT ALLEGES IS CRIMINAL EITHER IN  
9 SAN DIEGO COUNTY OR IMPERIAL COUNTY, IN THE SOUTHERN DISTRICT  
10 OF CALIFORNIA.

11 YOU HEARD ME SAY THIS BEFORE. IT BEARS REPEATING.  
12 YOU'RE NOT TO JUDGE THE WISDOM OF THE CRIMINAL LAWS ENACTED BY  
13 CONGRESS; THAT IS, WHETHER OR NOT THERE SHOULD OR SHOULD NOT  
14 BE A FEDERAL LAW DESIGNATING ACTIVITY AS CRIMINAL IS A MATTER  
15 TO BE DETERMINED BY CONGRESS AND NOT BY YOU.

16 FURTHERMORE, WHEN DECIDING WHETHER OR NOT TO INDICT,  
17 YOU SHOULD NOT CONSIDER SUCH THINGS AS PUNISHMENT IN THE EVENT  
18 OF CONVICTION. PUNISHMENT IS A MATTER FOR THE COURT, AND IT  
19 SHOULD NOT AFFECT YOUR DETERMINATION ON WHETHER THE EVIDENCE  
20 IS SUBSTANTIAL ENOUGH TO JUSTIFY BRINGING FORWARD THE CHARGES.

21 THE CASES THAT YOU'LL HEAR WILL COME TO YOU IN  
22 DIFFERENT WAYS. FREQUENTLY, PEOPLE ARE ARRESTED DURING OR  
23 SHORTLY AFTER THE COMMISSION OF A CRIME. WHEN THAT HAPPENS,  
24 TYPICALLY THEY'RE TAKEN IN FRONT OF ONE OF THE MAGISTRATE  
25 JUDGES WHO HOLDS A PRELIMINARY HEARING AND MAKES A PRELIMINARY

1 ASSESSMENT OF THE PROBABLE CAUSE TO BELIEVE WHETHER A FEDERAL  
2 CRIME WAS COMMITTED AND THIS PERSON WAS ASSOCIATED WITH THE  
3 COMMISSION OF THE CRIME.

4 IF THE MAGISTRATE JUDGE DOES FIND PROBABLE CAUSE,  
5 THEN HE'LL DIRECT THAT THE PERSON BE HELD FOR ACTION BY THE  
6 GRAND JURY. SO THEN YOU CAN INDEPENDENTLY CONSIDER WHETHER  
7 THERE SHOULD BE AN INDICTMENT. NO INDICTMENT, REMEMBER, CAN  
8 GO FORWARD WITHOUT YOUR IMPRIMATUR, WITHOUT YOUR INDEPENDENT  
9 JUDGMENT OKAYING THAT INDICTMENT.

10 OTHER CASES CAN BE BROUGHT TO YOU BY THE GOVERNMENT  
11 ATTORNEY, THE U.S. ATTORNEY, OR HER ASSISTANTS BEFORE AN  
12 ARREST, BUT AFTER AN INVESTIGATION HAS BEEN CONDUCTED BY A  
13 GOVERNMENT AGENCY SUCH AS THE FBI OR THE TREASURY DEPARTMENT  
14 OR DEA, POSTAL AUTHORITIES, OR OTHER FEDERAL ENFORCEMENT  
15 OFFICIALS.

16 FREQUENTLY, YOU'LL BE A COMPONENT OF THAT  
17 INVESTIGATION. THERE WON'T BE ANY ARRESTS MADE YET, BUT THE  
18 GOVERNMENT MAY BRING TO YOU SOMETHING THAT LOOKS SUSPICIOUS  
19 AND THAT THEY BELIEVE MAY BE CRIMINAL. AND YOU'LL BE CALLED  
20 UPON TO PARTICIPATE IN THE INVESTIGATION OF THAT MATTER TO  
21 DETERMINE WHETHER CHARGES SHOULD BE BROUGHT.

22 SINCE THE GOVERNMENT ATTORNEY HAS THE DUTY OF  
23 PROSECUTING PEOPLE CHARGED WITH THE COMMISSION OF FEDERAL  
24 CRIMES, THAT ATTORNEY WILL PRESENT MATTERS THAT THE GOVERNMENT  
25 WANTS YOU TO CONSIDER. THE GOVERNMENT WILL POINT OUT TO YOU



1 THE LAWS WHICH IT BELIEVES HAVE BEEN VIOLATED AND TYPICALLY  
2 WILL SUBPOENA FOR TESTIMONY BEFORE YOU SUCH WITNESSES AS THE  
3 LAWYER THINKS ARE IMPORTANT AND NECESSARY AND ALSO ANY OTHER  
4 WITNESSES THAT YOU REQUEST OR DIRECT BE CALLED BEFORE YOU.

5 REMEMBER, YOU'RE ACTING INDEPENDENT OF THE  
6 GOVERNMENT'S ATTORNEY. IF YOU WANT ADDITIONAL EVIDENCE, IF  
7 YOU THINK ADDITIONAL WITNESSES OUGHT TO BE CALLED, THEN THAT  
8 IS YOUR EXCLUSIVE PREROGATIVE. YOU'RE TO DIRECT OR ASK THE  
9 U.S. ATTORNEY TO CALL THOSE PEOPLE IF YOU WANT TO HEAR FROM  
10 THEM AS WELL.

11 IF, DURING THE COURSE OF YOUR HEARINGS, IT TURNS OUT  
12 THAT A DIFFERENT CRIME OTHER THAN THE ONE THAT YOU'RE  
13 INVESTIGATING SURFACES, YOU HAVE THE RIGHT TO PURSUE THE NEW  
14 CRIME. ALTHOUGH YOU CAN SUBPOENA NEW WITNESSES AND DOCUMENTS,  
15 YOU DON'T HAVE THE POWER AS A GRAND JURY TO EMPLOY  
16 INVESTIGATORS OR TO EXPEND FEDERAL FUNDS FOR INVESTIGATIVE  
17 PURPOSES. RATHER, AS I SAID, YOU MUST TURN TO THE U.S.  
18 ATTORNEY AND ASK THEM TO BRING THE PEOPLE IN.

19 IF THE GOVERNMENT ATTORNEY REFUSES TO ASSIST YOU OR  
20 YOU BELIEVE THE GOVERNMENT LAWYER IS NOT ACTING IMPARTIALLY,  
21 YOU CAN TAKE IT UP WITH ME OR ANY OTHER JUDGE OF THIS COURT.  
22 I'M WILLING AND AVAILABLE TO MEET WITH YOU.

23 USE THIS POWER -- YOU MAY USE THIS POWER EVEN OVER  
24 THE ACTIVE OPPOSITION OF THE GOVERNMENT LAWYER IF YOU BELIEVE  
25 IT'S NECESSARY AND IN THE INTEREST OF JUSTICE. AGAIN, THIS

1       UNDERScores YOUR INDEPENDENCE AS A GROUP OF CITIZENS.

2               THE EVIDENCE THAT YOU'LL CONSIDER AS GRAND JURORS  
3       WILL NORMALLY CONSIST OF ORAL TESTIMONY FROM WITNESSES AND  
4       WRITTEN DOCUMENTS OR TANGIBLE THINGS. SOMETIMES IT WILL BE  
5       DIAGRAMS, PHOTOGRAPHS, AND THE LIKE. THE WITNESSES WHO APPEAR  
6       BEFORE THE GRAND JURY DO SO SEPARATELY. IN OTHER WORDS,  
7       THERE'S NEVER A TIME WHEN THERE'S TWO WITNESSES AT THE SAME  
8       TIME IN FRONT OF YOU.

9               WHEN A WITNESS FIRST APPEARS BEFORE YOU, IT'S THE  
10       RESPONSIBILITY OF THE FOREPERSON OF THE GRAND JURY TO  
11       ADMINISTER AN OATH OR AN AFFIRMATION TO THE WITNESS, AND THE  
12       AFFIRMATION ON THE PART OF THE WITNESS WILL ATTEST THAT THE  
13       WITNESS UNDERSTANDS THE DUTY TO TESTIFY TRUTHFULLY. AFTER  
14       THIS HAS BEEN ACCOMPLISHED, THE WITNESS CAN BE QUESTIONED.

15              ORDINARILY, THE GOVERNMENT LAWYER WILL QUESTION THE  
16       WITNESS FIRST. THEN IT MAY BE UP TO THE FOREPERSON OR THE  
17       ASSISTANT FOREPERSON OR ANY OTHER MEMBER OF THE GRAND JURY TO  
18       ASK QUESTIONS. IN THE EVENT THE WITNESS DOESN'T SPEAK OR  
19       UNDERSTAND ENGLISH, AN INTERPRETER MAY BE BROUGHT INTO THE  
20       GRAND JURY ROOM TO ASSIST IN THE QUESTIONING. THIS IS AN  
21       IMPORTANT POINT. YOU'RE ENCOURAGED TO EXERCISE YOUR  
22       INDEPENDENCE. YOU CAN ASK FOLLOW-UP QUESTIONS THAT YOU DEEM  
23       ARE RELEVANT.

24              SOME OF THE ASSISTANT U.S. ATTORNEYS MAY FOLLOW A  
25       PROTOCOL OF ASKING YOU TO PUT THE QUESTIONS IN WRITING AND

1 HAVE THEM ASK THEM FOR YOU. LET ME TELL YOU IN MY EXPERIENCE  
2 WHY THAT IS SOMETIMES. LET ME GO BACK.

3 WHEN I WAS DOING THIS 20 YEARS AGO, A QUESTION WOULD  
4 ARISE OCCASIONALLY "HAS THIS PERSON EVER BEEN IN TROUBLE  
5 BEFORE? DO THEY HAVE ANY KIND OF CRIMINAL RECORD?"

6 NOW, THAT'S A PROPER QUESTION. IT CAN BE ASKED.  
7 BUT ORDINARILY, I WOULD CAUTION THE GRAND JURORS NOT TO ASK  
8 THAT QUESTION UNLESS IT RELATED TO AN ELEMENT OF ONE OF THE  
9 PROPOSED CHARGES UNTIL AFTER THEY HAVE MADE A DECISION WHETHER  
10 TO INDICT. I DIDN'T WANT THEM TO BE INFLUENCED, FOR EXAMPLE,  
11 BY THE FACT THAT SOMEBODY HAD DONE IT BEFORE, AND SO THEY'RE  
12 DOING IT AGAIN.

13 SO YOU MAY FIND THAT SOME OF THE GOVERNMENT LAWYERS  
14 WILL SAY, "I'LL GET AN ANSWER TO THAT FOR YOU, BUT I'D LIKE TO  
15 DEFER THE QUESTION UNTIL LATER." THAT'S UP TO YOU. YOU CAN  
16 ACCEDE TO THAT REQUEST IF YOU FIND THAT IT'S APPROPRIATE OR  
17 YOU CAN INSIST ON THE QUESTION BEING ANSWERED AT THE SAME  
18 TIME.

19 AS I SAID, WHEN I ASKED THAT THAT QUESTION BE  
20 DEFERRED, IT WAS BECAUSE I DIDN'T WANT ANYBODY TO BE  
21 INFLUENCED BY A PRIOR RECORD IN DETERMINING WHETHER THE  
22 EVIDENCE BEFORE THEM ON THE NEW ALLEGATIONS WERE SUFFICIENT TO  
23 JUSTIFY GOING FORWARD. SO THAT'S JUST ONE EXAMPLE OR ONE  
24 CONTEXT IN WHICH YOU MAY RUN INTO THE PROSECUTOR SAYING "LET'S  
25 NOT ASK THAT NOW" OR "LET'S ASK IT LATER." AGAIN, THOUGH, YOU

1 HAVE THE INDEPENDENT RIGHT TO POSE QUESTIONS AND HAVE THOSE  
2 QUESTIONS ANSWERED BEFORE YOU TAKE ACTION.

3 WITNESSES WHO DO APPEAR IN FRONT OF YOU SHOULD BE  
4 TREATED COURTEOUSLY, AND QUESTIONS PUT TO THEM SHOULD BE DONE  
5 IN AN ORDERLY FASHION. IF YOU HAVE ANY DOUBT WHETHER IT'S  
6 PROPER TO ASK A PARTICULAR QUESTION, THEN ASK THE GOVERNMENT  
7 LAWYER FOR ADVICE. IF NECESSARY, YOU CAN OBTAIN A RULING FROM  
8 THE COURT IN CASES WHERE THERE IS NOT AGREEMENT.

9 YOU AS GRAND JURORS DECIDE HOW MANY WITNESSES YOU  
10 WANT TO HEAR. YOU CAN SUBPOENA A WITNESS FROM ANYWHERE IN THE  
11 COUNTRY DIRECTING THAT THE GOVERNMENT ATTORNEYS ISSUE A  
12 NECESSARY SUBPOENA. HOWEVER, BEAR IN MIND THAT PEOPLE SHOULD  
13 NOT ORDINARILY BE SUBJECTED TO DISRUPTION OF THEIR DAILY LIVES  
14 OR HARASSED OR ANNOYED OR INCONVENIENCED, NOR SHOULD PUBLIC  
15 FUNDS BE EXPENDED TO BRING WITNESSES IN UNLESS YOU BELIEVE  
16 THAT THE WITNESS CAN PROVIDE MEANINGFUL EVIDENCE WHICH WILL  
17 ASSIST YOU IN YOUR INVESTIGATION.

18 EVERY WITNESS WHO APPEARS BEFORE THE GRAND JURY HAS  
19 CERTAIN RIGHTS. WITNESSES HAVE THE RIGHT, FOR EXAMPLE, TO  
20 REFUSE TO ANSWER QUESTIONS IF THE ANSWER WOULD TEND TO  
21 INCRIMINATE THEM AND THE RIGHT TO KNOW THAT ANYTHING THEY SAY  
22 MAY BE USED AGAINST THEM LATER. IF THAT HAPPENS IN A MATTER  
23 UNDER INVESTIGATION BEFORE YOU, YOU SHOULD HOLD NO PREJUDICE  
24 AGAINST A WITNESS WHO EXERCISES THE RIGHT AGAINST COMPULSORY  
25 SELF-INCRIMINATION, AND THIS CAN PLAY NO PART IN THE RETURN OF

1 ANY INDICTMENT.

2 WHAT THAT MEANS IS ALL OF US HAVE THE RIGHT, IF WE  
3 THINK THAT THE ANSWER MAY INCRIMINATE US, NOT TO ANSWER.  
4 THAT'S ONE OF OUR CONSTITUTIONAL GUARANTEES. IF THAT HAPPENS  
5 IN A CASE UNDER INVESTIGATION BEFORE YOU, YOU NEED TO EXERCISE  
6 THE MENTAL DISCIPLINE TO PUT THAT OUT OF YOUR MIND WHEN  
7 DETERMINING WHETHER THE EVIDENCE OTHER THAN THAT INVOCATION OF  
8 RIGHTS WHICH IS NOT EVIDENCE -- BUT WHETHER THE EVIDENCE OF  
9 ITSELF IS SUFFICIENT TO JUSTIFY THE CHARGE. YOU CAN'T BE  
10 PREJUDICED AGAINST SOMEBODY WHO MAY HAVE INVOKED THEIR RIGHT  
11 TO REMAIN SILENT.

12 WITNESSES WHO APPEAR BEFORE THE GRAND JURY ARE NOT  
13 PERMITTED TO HAVE A LAWYER PRESENT WITH THEM IN THE GRAND JURY  
14 ROOM, ALTHOUGH THE LAW DOES ALLOW A WITNESS TO CONFER WITH A  
15 LAWYER OUTSIDE THE GRAND JURY ROOM. THAT MAY HAPPEN, IF  
16 EXPERIENCE IS A GUIDE, IN CERTAIN CASES. A WITNESS MAY SHOW  
17 UP WITH A LAWYER AND MAY FROM TIME TO TIME ASK FOR BREAKS IN  
18 THE GRAND JURY SESSION TO CONSULT WITH THE LAWYER.

19 SINCE APPEARANCE BEFORE A GRAND JURY MAY PRESENT  
20 COMPLEX LEGAL PROBLEMS THAT REQUIRE THE ASSISTANCE OF A  
21 LAWYER, YOU SHOULD NOT HOLD IT AGAINST A WITNESS IF A WITNESS  
22 CHOOSES TO EXERCISE THE RIGHT TO CONSULT WITH A LAWYER AND  
23 FROM TIME TO TIME LEAVES THE GRAND JURY ROOM FOR THAT PURPOSE.

24 ORDINARILY, NEITHER THE PERSON BEING INVESTIGATED BY  
25 THE GOVERNMENT NOR ANY WITNESS ON BEHALF OF THAT PERSON WILL

1 TESTIFY IN FRONT OF THE GRAND JURY. IT'S MOSTLY A ONE-SIDED  
2 AFFAIR WITH THE GOVERNMENT PRESENTING WITNESSES IN SUPPORT OF  
3 THE PROPOSED CHARGE. UPON THE REQUEST OF A PERSON WHO IS  
4 UNDER INVESTIGATION, HOWEVER, PREFERABLY IN WRITING, YOU MAY  
5 AFFORD THAT PERSON AN OPPORTUNITY TO APPEAR IN FRONT OF YOU.  
6 THE GOVERNMENT PROSECUTORS WILL ALERT YOU IF THEY'VE RECEIVED  
7 ANY SUCH REQUEST. IF A PERSON'S THE TARGET OF AN  
8 INVESTIGATION AND WANTS TO TESTIFY, THEN THEY WILL TELL YOU  
9 THAT. IT'S UP TO YOU TO AFFORD THAT PERSON AN OPPORTUNITY TO  
10 TESTIFY IF YOU CHOOSE.

11 BECAUSE THE APPEARANCE OF A PERSON BEING  
12 INVESTIGATED BEFORE YOU MAY RAISE COMPLICATED LEGAL PROBLEMS,  
13 YOU SHOULD CONSULT WITH THE GOVERNMENT ATTORNEY AND SEEK THE  
14 GOVERNMENT ATTORNEY'S ADVICE AND, IF NECESSARY, THE COURT'S  
15 ADVICE BEFORE DETERMINING WHETHER IT'S APPROPRIATE FOR THE  
16 PERSON TO APPEAR IN FRONT OF YOU.

17 IF THAT DOES OCCUR, WHERE SOMEONE WHO'S ACTUALLY  
18 UNDER INVESTIGATION OR THE OBJECT OR TARGET OF THE  
19 INVESTIGATION WANTS TO TESTIFY, BEFORE THAT HAPPENS, THAT  
20 PERSON MUST BE ADVISED OF HIS OR HER RIGHTS AND REQUIRED TO  
21 SIGN A FORMAL WAIVER. AND YOU SHOULD BE COMPLETELY SATISFIED  
22 THAT THE PERSON BEING INVESTIGATED UNDERSTANDS WHAT HE OR SHE  
23 IS DOING. YOU'RE NOT REQUIRED TO SUMMON WITNESSES THAT THE  
24 PERSON MAY WISH YOU TO EXAMINE UNLESS PROBABLE CAUSE FOR  
25 INDICTMENT MAY BE EXPLAINED AWAY BY THEIR TESTIMONY. AGAIN,

1 THIS IS A MATTER FOR YOU ACTING INDEPENDENTLY.

2 THE DETERMINATION OF WHETHER A WITNESS IS TELLING  
3 THE TRUTH IS SOMETHING THAT YOU MUST DECIDE. NEITHER THE  
4 COURT NOR THE PROSECUTORS NOR ANY OFFICERS OF THE COURT CAN  
5 MAKE THAT DETERMINATION FOR YOU. AS YOU LISTEN TO THE WITNESS  
6 PRESENTED TO THE GRAND JURY AND HEAR THEIR TESTIMONY, REMEMBER  
7 THAT YOU ARE THE EXCLUSIVE JUDGES OF EACH WITNESS'S  
8 CREDIBILITY. YOU CAN BELIEVE THE WITNESS'S TESTIMONY OR PART  
9 OF IT OR NONE OF IT AT ALL.

10 DETERMINING THE CREDIBILITY OF A WITNESS INVOLVES A  
11 QUESTION OF FACT, NOT A QUESTION OF LAW. IT'S A MATTER TO  
12 WHICH YOU BRING YOUR GOOD JUDGMENT AND YOUR EXPERIENCE. ALL  
13 OF US HAVE WHAT I SOMETIMES CALL POLYGRAPH INSTINCTS THAT WE  
14 DEVELOP OVER THE YEARS. WE HAVE AN INSTINCT FOR KNOWING  
15 WHETHER SOMETHING HAS THE RING OF TRUTH OR NOT. OBVIOUSLY,  
16 YOU USE THOSE IN EVALUATING WITNESS TESTIMONY BEFORE THE GRAND  
17 JURY.

18 ALSO, WHEN YOU HEAR WITNESSES BEFORE THE GRAND JURY,  
19 YOU MAY CONSIDER WHETHER THE WITNESSES ARE PERSONALLY  
20 INTERESTED IN THE OUTCOME OF THE INVESTIGATION, WHETHER THEIR  
21 TESTIMONY HAS BEEN CORROBORATED OR SUPPORTED BY OTHER  
22 WITNESSES OR CIRCUMSTANCES, WHAT OPPORTUNITY THEY HAD FOR  
23 OBSERVING OR ACQUIRING KNOWLEDGE CONCERNING THE THINGS THAT  
24 THEY'RE TESTIFYING ABOUT. YOU MAY ALSO CONSIDER THE  
25 REASONABLENESS OF THEIR TESTIMONY, THE PROBABILITY OF THE



1 TESTIMONY, AND CERTAINLY THEIR MANNER AND DEMEANOR WHILE  
2 TESTIFYING. THESE SEVERAL FACTORS ARE THE SAME THINGS WE TELL  
3 TRIAL JURIES. SO THOSE OF YOU WHO SAT ON TRIAL JURIES BEFORE  
4 MAY HAVE IN MIND YOU GOT A SIMILAR INSTRUCTION.

5 AS I MENTIONED TO YOU, THE RULES OF EVIDENCE DON'T  
6 APPLY WITH FULL FORCE BEFORE THE GRAND JURY. HEARSAY  
7 TESTIMONY IS ADMISSIBLE BEFORE A GRAND JURY. HEARSAY IS  
8 TESTIMONY THAT RELATES TO FACTS NOT KNOWN BY THE WITNESS OF  
9 THE WITNESS'S OWN PERSONAL KNOWLEDGE. INSTEAD, IT HAS BEEN  
10 TOLD OR RELATED TO THE WITNESS BY PERSONS OTHER THAN THE  
11 PERSON BEING INVESTIGATED.

12 HEARSAY TESTIMONY, IF YOU DEEM IT TO BE RELIABLE AND  
13 PERSUASIVE, MAY ITSELF PROVIDE A BASIS FOR RETURNING AN  
14 INDICTMENT. YOU'RE FREE TO RELY ON HEARSAY TESTIMONY IF YOU  
15 FIND IT TO BE PERSUASIVE AND RELIABLE. YOU MUST BE SATISFIED  
16 THAT THERE IS EVIDENCE AGAINST THE ACCUSED SHOWING PROBABLE  
17 CAUSE. AND THAT'S SO EVEN IF THE EVIDENCE PRESENTED TO YOU IS  
18 COMPOSED OF HEARSAY, THAT MIGHT OR MIGHT NOT BE ADMISSIBLE  
19 WHEN THE CASE FINALLY GOES TO TRIAL.

20 FREQUENTLY CHARGES ARE MADE AGAINST MORE THAN ONE  
21 PERSON. IT'S YOUR DUTY IN INSTANCES WHERE YOU'RE PRESENTED  
22 WITH AN INDICTMENT THAT IT PROPOSES CHARGING SEVERAL PEOPLE TO  
23 EXAMINE THE EVIDENCE AS IT RELATES TO EACH PERSON WHO IS  
24 PROPOSED TO BE CHARGED AND TO MAKE YOUR FINDINGS INDIVIDUALLY  
25 AS TO EACH PERSON.



1           STATED DIFFERENTLY, YOU'RE TO LOOK AT THE CASE  
2       AGAINST EACH PERSON THAT THE GOVERNMENT PROPOSES BE CHARGED  
3       AND DETERMINE WHETHER THERE'S PROBABLE CAUSE THAT EACH PERSON  
4       WAS INVOLVED IN THE COMMISSION OF A FEDERAL CRIME.

5           YOU ARE, OF COURSE, FREE TO INDICT EVERYONE WHO IS  
6       PROPOSED BY THE GOVERNMENT TO BE INDICTED OR ONLY THOSE PEOPLE  
7       THAT YOU BELIEVE PROPERLY DESERVE TO BE INDICTED.

8           ONCE YOU'VE HEARD THE EVIDENCE IN SUPPORT OF AN  
9       INDICTMENT, YOU'LL THEN PROCEED TO DELIBERATE WHETHER THE  
10      MATTER SHOULD BE INDICTED. WHEN YOU DO SO, NO ONE OTHER THAN  
11      YOU, YOUR OWN MEMBERS, OR AN INTERPRETER NECESSARY TO ASSIST A  
12      JUROR WHO IS HEARING- OR SPEECH-IMPAIRED -- AND I DON'T THINK  
13      WE HAVE ANY HERE IN THIS PANEL -- IS TO BE PRESENT WHILE  
14      YOU'RE DELIBERATING. IN OTHER WORDS, ONLY THE GRAND JURORS,  
15      NOT THE COURT REPORTER OR THE GOVERNMENT LAWYER OR ANYONE  
16      ELSE, IS PRESENT DURING THE DELIBERATION IN VOTING ON WHETHER  
17      AN INDICTMENT SHOULD BE RETURNED.

18           TO RETURN AN INDICTMENT CHARGING SOMEONE WITH AN  
19      OFFENSE, IT'S NOT NECESSARY THAT YOU FIND THE PERSON GUILTY  
20      BEYOND A REASONABLE DOUBT. THAT'S A TRIAL LEVEL STANDARD.  
21      THAT'S NOT THE STANDARD THAT APPLIES TO A GRAND JURY. YOU'RE  
22      NOT A TRIAL JURY, AND YOUR TASK IS NOT TO DECIDE ULTIMATELY  
23      WHETHER THE PERSON IS GUILTY OR NOT GUILTY. INSTEAD, AS I'VE  
24      MENTIONED AND ALLUDED TO SEVERAL TIMES, YOUR TASK IS TO  
25      DETERMINE WHETHER THE GOVERNMENT'S EVIDENCE AS PRESENTED TO

1 YOU IS SUFFICIENT TO CAUSE YOU TO CONCLUDE THAT THERE'S  
2 PROBABLE CAUSE TO BELIEVE THAT THE PERSON BEING INVESTIGATED  
3 COMMITTED THE OFFENSE CHARGED.

4 THAT'S A TWO-PART ASSESSMENT: NUMBER ONE, YOU'LL  
5 HAVE A REASONABLE BELIEF THAT A FEDERAL CRIME WAS COMMITTED;  
6 AND NUMBER TWO, YOU'LL HAVE A REASONABLE BELIEF THAT THIS  
7 PERSON THAT THEY'RE ASKING YOU TO CHARGE PARTICIPATED IN THE  
8 CRIME IN SOME FASHION, EITHER COMMITTED IT OR ATTEMPTED IT OR  
9 HELPED SOMEBODY COMMIT IT OR CONSPIRED WITH PEOPLE TO COMMIT  
10 IT.

11 EACH GRAND JUROR HAS THE RIGHT TO EXPRESS HIS OR HER  
12 OWN VIEW OF THE MATTER UNDER CONSIDERATION. THAT OCCURS  
13 OBVIOUSLY DURING THE PROCESS OF DELIBERATION. ONLY AFTER ALL  
14 OF THE GRAND JURORS HAVE BEEN GIVEN AN OPPORTUNITY TO BE HEARD  
15 SHOULD YOU TAKE A VOTE ON WHETHER TO RETURN AN INDICTMENT.

16 YOU MAY DECIDE AFTER DELIBERATION AMONG YOURSELVES  
17 THAT THE TIME IS NOT RIGHT FOR AN INDICTMENT AND YOU NEED  
18 FURTHER EVIDENCE BEFORE A VOTE IS TAKEN. IN THAT CASE, YOU  
19 CAN ASK THE GOVERNMENT LAWYER TO CALL ADDITIONAL WITNESSES OR  
20 PRESENT ADDITIONAL EVIDENCE OR YOU MAY DIRECT A SUBPOENA FOR  
21 ADDITIONAL DOCUMENTS OR WITNESSES THAT YOU WANT TO CONSIDER  
22 BEFORE YOU TAKE A FINAL VOTE.

23 WHEN YOU HAVE DECIDED TO VOTE, THE FOREPERSON OF THE  
24 GRAND JURY SHALL DESIGNATE A JUROR AS THE SECRETARY, WHO WILL  
25 KEEP RECORD OF THE VOTE. THAT RECORD IS TO BE FILED WITH THE

1 CLERK OF THE COURT AFTER EACH SESSION IN WHICH VOTES ARE  
2 TAKEN. THE RECORD DOES NOT INCLUDE THE NAMES OF THE JURORS,  
3 BUT ONLY THE NUMBER OF THOSE VOTING FOR INDICTMENT. YOU WILL  
4 NOT BE PERSONALLY IDENTIFIED BY THE VOTE THAT YOU GIVE, BUT  
5 THE NUMBERS WILL BE IDENTIFIED.

6 REMEMBER THAT AT LEAST 16 JURORS MUST BE PRESENT AT  
7 ALL TIMES. AND IN ORDER TO RETURN AN INDICTMENT, AT LEAST 12  
8 MEMBERS MUST VOTE IN FAVOR OF AN INDICTMENT BEFORE ONE MAY BE  
9 RETURNED. SO IT TAKES 12 VOTES TO RETURN AN INDICTMENT. IF  
10 12 OR MORE MEMBERS OF THE GRAND JURY AFTER DELIBERATING  
11 BELIEVE THAT AN INDICTMENT IS WARRANTED, THEN YOU'LL REQUEST  
12 THE GOVERNMENT LAWYER PREPARE THE FORMAL WRITTEN INDICTMENT.  
13 THAT'S THE CHARGING PAPER ITSELF THAT LISTS THE CHARGES AND  
14 HAS THE CAPTION UNITED STATES AGAINST THE PERSON WHO IS  
15 PROPOSED TO BE INDICTED.

16 TYPICALLY, THE PROPOSED INDICTMENTS ARE PRESENTED IN  
17 ADVANCE. THE GOVERNMENT WILL ALREADY HAVE THE PAPERWORK DONE  
18 SO YOU CAN LOOK AT IT. THE INDICTMENT SHOULD SET FORTH THE  
19 DATE AND PLACE OF THE OFFENSE, AND IT WILL ASSERT  
20 CIRCUMSTANCES MAKING THE ALLEGED CONDUCT CRIMINAL. AND  
21 IMPORTANTLY, IT WILL ALSO IDENTIFY THE CRIMINAL STATUTE THAT  
22 HAS BEEN VIOLATED.

23 ONCE THE VOTE IS TAKEN AND ASSUMING IT IS TO INDICT,  
24 THEN IT'S THE RESPONSIBILITY OF THE FOREPERSON OF THE GRAND  
25 JURY TO SIGN THE INDICTMENT AS A TRUE BILL IN A SPACE FOLLOWED

1 BY THE WORD "FOREPERSON." IT'S THE DUTY OF THE FOREPERSON TO  
2 SIGN EVERY INDICTMENT WHETHER OR NOT THE FOREPERSON VOTED FOR  
3 IT OR AGAINST IT.

4 IF FEWER THAN 12 MEMBERS OF THE GRAND JURY VOTE IN  
5 FAVOR OF AN INDICTMENT WHICH HAS BEEN SUBMITTED TO YOU FOR  
6 YOUR CONSIDERATION, THEN THAT DOCUMENT IS TO BE ENDORSED AS  
7 NOT A TRUE BILL; THAT IS, IF YOU CAN'T MUSTER 12 VOTES, THEN  
8 THE "NOT A TRUE BILL" IS WRITTEN ON THE DOCUMENT. AND IT'S  
9 RETURNED TO THE COURT, AND THE COURT IMPOUNDS IT.

10 ONCE INDICTMENTS HAVE BEEN RETURNED AND SIGNED, THEY  
11 ARE PRESENTED TO A JUDGE OR A MAGISTRATE JUDGE IN OPEN COURT  
12 BY THE FOREPERSON. IT USED TO BE THAT THE ENTIRE GRAND JURY  
13 HAD TO RETURN THE INDICTMENTS. BACK WHEN I WAS DOING THIS 18,  
14 23 PEOPLE WOULD MARCH OVER TO THE FEDERAL JUDGE'S CHAMBERS AND  
15 RETURN THE INDICTMENT.

16 A FEW YEARS AGO, CONGRESS AMENDED THE RULE SO THAT  
17 THE GRAND JURY COULD BE REPRESENTED BY JUST THE FOREPERSON OR  
18 THE DEPUTY FOREPERSON. SO THAT MAKES IT A LITTLE BIT MORE  
19 CONVENIENT. IN THE ABSENCE OF THE FOREPERSON, THE DEPUTY  
20 FOREPERSON ACTS IN HIS OR HER PLACE AND PERFORMS ALL THE  
21 FUNCTIONS OF THE FOREPERSON.

22 NOW, LET ME TALK TO YOU A LITTLE BIT ABOUT THE  
23 INDEPENDENCE OF THE GRAND JURY. AND WE'RE NEARLY THROUGH WITH  
24 THESE INSTRUCTIONS.

25 IT'S VERY IMPORTANT FOR YOU TO REALIZE THAT UNDER

1 THE U.S. CONSTITUTION, THE GRAND JURY IS AN INDEPENDENT ARM.  
2 IT'S INDEPENDENT OF THE UNITED STATES ATTORNEY, AND IT'S NOT  
3 AN ARM OF ANY OF THE AGENCIES WHOSE REPRESENTATIVES MIGHT  
4 APPEAR BEFORE YOU. YOU'RE NOT PART OF THE FBI OR THE DEA OR  
5 THE INTERNAL REVENUE SERVICE OR ANY OF THOSE OTHERS. SIMPLY  
6 PUT, AS I TOLD YOU, THE GRAND JURY IS AN INDEPENDENT BODY. IT  
7 DOESN'T BELONG TO ANY BRANCH OF GOVERNMENT.

8 HOWEVER, AS A PRACTICAL MATTER, YOU'RE GOING TO WORK  
9 CLOSELY WITH GOVERNMENT LAWYERS. THE ASSISTANT UNITED STATES  
10 ATTORNEYS HERE ARE THE ONES THAT ARE TASKED TYPICALLY WITH  
11 BRINGING MATTERS FOR YOU TO CONSIDER. AND SO THEY WILL MOST  
12 FREQUENTLY BE THE GOVERNMENT OFFICIALS IN FRONT OF YOU.

13 THEY'LL PROVIDE YOU WITH IMPORTANT SERVICE. THEY'LL  
14 HELP YOU FIND YOUR WAY WHEN YOU'RE CONFRONTED WITH COMPLEX  
15 LEGAL MATTERS. ALL OF THE STAFF OF THE U.S. ATTORNEY'S OFFICE  
16 ARE LAWYERS, AND MOST ARE EXPERIENCED LAWYERS.

17 IT'S ENTIRELY PROPER FOR YOU TO SEEK AND RECEIVE  
18 ASSISTANCE FROM THE ASSISTANT UNITED STATES ATTORNEYS. IF  
19 PAST EXPERIENCE IS ANY INDICATION OF WHAT TO EXPECT IN THE  
20 FUTURE, THEN YOU CAN EXPECT CANDOR AND HONESTY AND GOOD FAITH  
21 IN MATTERS PRESENTED TO YOU BY THE GOVERNMENT ATTORNEYS.

22 HOWEVER, KEEP IN MIND ULTIMATELY YOU HAVE TO DEPEND  
23 ON YOUR OWN INDEPENDENT JUDGMENT. YOU NEVER BECOME AN ARM OF  
24 THE U.S. ATTORNEY'S OFFICE. THE GOVERNMENT ATTORNEYS ARE  
25 PROSECUTORS. YOU'RE NOT. YOU'RE JUDGES; JUDGES OF FACT. IF

1 THE FACTS SUGGEST TO YOU THAT YOU SHOULD NOT INDICT, THEN YOU  
2 SHOULD NOT DO SO EVEN IN THE FACE OF OPPOSITION OR STATEMENTS  
3 OF OPPOSITION MADE BY THE GOVERNMENT LAWYERS.

4 IT'S YOUR PREROGATIVE. IT'S UP TO YOU, AND NO ONE  
5 SHOULD BE FORCED TO DO THIS IF THEY DON'T THINK  
6 CONSCIENTIOUSLY THAT RETURN OF AN INDICTMENT IS APPROPRIATE.  
7 OBVIOUSLY, IT VIOLATES THE OATH THAT YOU'VE TAKEN TO  
8 CONSCIENTIOUSLY EVALUATE THESE MATTERS IF YOU MERELY  
9 RUBBER-STAMP THE INDICTMENT BEING BROUGHT TO YOU BY THE  
10 GOVERNMENT REPRESENTATIVES.

11 JUST AS YOU HAVE TO MAINTAIN INDEPENDENCE IN YOUR  
12 DEALINGS WITH GOVERNMENT LAWYERS, YOU SHOULD ALSO DO SO IN  
13 YOUR DEALINGS WITH THE COURT. DEALINGS WITH THE COURT SHOULD  
14 BE ON A FORMAL BASIS. IF YOU HAVE A QUESTION FOR THE COURT OR  
15 YOU WANT TO MAKE PRESENTMENT OR RETURN OF AN INDICTMENT TO THE  
16 COURT, THEN TYPICALLY YOU'LL ASSEMBLE IN THE COURTROOM FOR  
17 THESE PURPOSES.

18 IN SOME INSTANCES, THE JUDGES WILL COME OVER TO THE  
19 GRAND JURY ROOM. FRANKLY, I LIKE THE EXERCISE. SO IF I EVER  
20 GET THE CALL, I COME OVER TO YOU. AND THERE WAS ALWAYS  
21 SOMETHING UNSEEMLY TO ME -- I HATE TO SAY THIS NOW -- ABOUT 18  
22 OR 23 PEOPLE COMING TO ONE RATHER THAN ONE COMING TO THE 23.  
23 SOME OF OUR JUDGES ARE VERY BUSY, AND THEY HAVE TO DO IT  
24 DURING RECESSES. SO I UNDERSTAND THAT. I GUESS I'M NOT  
25 CRITICIZING ANY OF THESE OTHER PEOPLE ON THE WALL. FOR MY

1 PURPOSES, I LIKE TO WALK OVER WHEN CALLED UPON. MOST OFTEN,  
2 THOUGH, IT WILL BE THE FOREPERSON OR THE DEPUTY FOREPERSON WHO  
3 WILL RETURN THE MATTER TO THE JUDGES.

4 EACH GRAND JUROR IS DIRECTED TO REPORT IMMEDIATELY  
5 TO THE COURT ANY ATTEMPT BY ANYBODY WHO UNDER ANY PRETENSE  
6 WHATSOEVER ADDRESSES OR CONTACTS YOU FOR THE PURPOSE OF TRYING  
7 TO GAIN INFORMATION OF ANY KIND CONCERNING THE PROCEEDINGS  
8 BEFORE THE GRAND JURY OR TO INFLUENCE YOU IN ANY MANNER. IF  
9 THAT HAPPENS, LET ME KNOW ABOUT IT RIGHT AWAY. I'M THE  
10 LIAISON TO THE JURIES AND THE GRAND JURIES. THAT SHOULD NOT  
11 HAPPEN UNDER ANY CIRCUMSTANCE. PLEASE CALL MY CHAMBERS AND  
12 TELL ME GENERALLY THAT YOU'VE BEEN CONTACTED AND YOU NEED TO  
13 SEE ME. I'LL MAKE TIME IMMEDIATELY TO DO THAT, OR ANY OTHER  
14 JUDGE OF OUR COURT.

15 NOW, ANOTHER REMINDER ABOUT THE OBLIGATION OF  
16 SECRECY.

17 YOUR PROCEEDINGS, THE GRAND JURY PROCEEDINGS, ARE  
18 SECRET. THEY HAVE TO REMAIN SECRET PERMANENTLY UNLESS AND  
19 UNTIL THE COURT TELLS YOU OTHERWISE. YOU CAN'T RELATE TO  
20 ANYONE, INCLUDING MEMBERS OF YOUR FAMILY, TO THE NEWS OR  
21 TELEVISION REPORTERS OR ANYONE ELSE, WHAT TRANSPIRED IN THE  
22 GRAND JURY ROOM.

23 AS I MENTIONED TO YOU, THERE ARE SEVERAL IMPORTANT  
24 REASONS FOR THIS REQUIREMENT. IF THINGS ARE DISCLOSED  
25 PREMATURELY THAT ARE CURRENTLY BEFORE THE GRAND JURY, THAT MAY



1 FRUSTRATE THE ENDS OF JUSTICE BY GIVING SOMEONE UNDER  
2 INVESTIGATION THE OPPORTUNITY TO ESCAPE OR BECOME A FUGITIVE.  
3 SOMETIMES IT LEADS TO PEOPLE DESTROYING EVIDENCE IF THEY KNOW  
4 THAT THEIR CONDUCT IS BEING SCRUTINIZED AND THOUGHT TO BE  
5 CRIMINAL.

6 ALSO, IF THE TESTIMONY OF A WITNESS IS DISCLOSED,  
7 THE WITNESS MAY BE SUBJECT TO INTIMIDATION OR RETALIATION.  
8 THERE HAVE BEEN INSTANCES WHERE PEOPLE HAVE BEEN INJURED,  
9 BEATEN UP, THAT TYPE OF THING. OR EVEN, AT A MINIMUM,  
10 TAMPERING WITH SOMEONE BEFORE THEY HAVE THE OPPORTUNITY TO  
11 GIVE TESTIMONY EITHER BEFORE YOU OR A TRIAL JURY. SO IT'S  
12 VERY, VERY IMPORTANT THAT -- AS THEY SAY ABOUT LAS VEGAS, WHAT  
13 HAPPENS IN THE GRAND JURY STAYS IN THE GRAND JURY.

14 THE REQUIREMENT OF SECRECY, AS I MENTIONED, TOO --  
15 AND THIS IS VERY IMPORTANT -- IT PROTECTS INNOCENT PEOPLE WHO  
16 MAY HAVE COME UNDER INVESTIGATION, BUT WHO HAVE BEEN CLEARED  
17 BY YOU, WHOSE ACTIONS ARE NOT DEEMED TO BE CRIMINAL. IN THE  
18 EYES OF SOME, AS I SAID, AN INVESTIGATION BY THE GRAND JURY OF  
19 ITSELF CARRIES WITH IT A SUGGESTION OF GUILT. IT'S THE POWER  
20 TO RUIN SOMEBODY, RUIN SOMEBODY'S REPUTATION.

21 I THINK ALL OF US HAVE EXPERIENCED AT SOME TIME  
22 READING IN THE PAPER THE SPECTER THAT SOMEBODY IS UNDER  
23 INVESTIGATION. THAT SHOULD NOT EMANATE FROM ANY MEMBER OF THE  
24 GRAND JURY. GREAT INJURY CAN BE DONE TO PEOPLE'S GOOD NAME  
25 EVEN THOUGH THEY'RE ULTIMATELY NOT INDICTED.



1 FINALLY, THE SECRECY REQUIREMENT HELPS PROTECT YOU.  
2 IT HELPS PROTECT YOU AS MEMBERS OF THE GRAND JURY FROM  
3 IMPROPER CONTACT BY THOSE WHO ARE UNDER INVESTIGATION. WE  
4 MAKE EVERY EFFORT TO ENSURE YOUR PRIVACY. YOUR NAMES ARE NOT  
5 DISCLOSED.

6 SO FOR ALL OF THESE REASONS, THE SECRECY REQUIREMENT  
7 IS OF UTMOST IMPORTANCE, AND IT HAS TO BE REGARDED BY YOU AS  
8 AN ABSOLUTE DUTY. I TELL YOU THIS JUST TO UNDERScore THIS.  
9 IF YOU DO VIOLATE YOUR OATH OF SECRECY, YOU'RE SUBJECT TO  
10 CRIMINAL PROSECUTION AND POSSIBLE PUNISHMENT. I KNOW NONE OF  
11 YOU WOULD BE INCLINED TO DO THAT. I MENTION THAT IN PASSING,  
12 IN ANY EVENT.

13 TO ENSURE THE SECRECY OF GRAND JURY PROCEEDINGS, THE  
14 LAW PROVIDES THAT ONLY AUTHORIZED PEOPLE MAY BE IN THE GRAND  
15 JURY ROOM WHEN EVIDENCE IS BEING PRESENTED. AND ONLY MEMBERS  
16 OF THE GRAND JURY, THE GOVERNMENT ATTORNEY, THE WITNESS UNDER  
17 EXAMINATION, THE COURT REPORTER, AND AN INTERPRETER, IF  
18 REQUIRED, MAY BE PRESENT. WHEN YOU'RE TAKING TESTIMONY, THOSE  
19 WILL BE THE ONLY FOLKS WHO ARE IN THE CHAMBER WITH YOU: YOU,  
20 YOUR FELLOW GRAND JURORS, THE COURT REPORTER, THE GOVERNMENT  
21 LAWYER WHO'S ASKING QUESTIONS; AND TYPICALLY JUST THE WITNESS.  
22 IF THE WITNESS NEEDS AN INTERPRETER, THEN THAT PERSON WILL BE  
23 THERE, TOO.

24 A REMINDER: IF YOU ULTIMATELY DECIDE TO VOTE FOR AN  
25 INDICTMENT, THE PRESENCE OF ANY UNAUTHORIZED PERSON IN THE

1 GRAND JURY ROOM COULD INVALIDATE THAT INDICTMENT. REMEMBER  
2 PARTICULARLY THAT AT THE TIME YOU TAKE THE VOTE, NO ONE BUT  
3 GRAND JURORS, OR IN THE CASE OF A HEARING-IMPAIRED MEMBER OF  
4 THE GRAND JURY AN INTERPRETER TO THAT PERSON, OR  
5 SPEECH-IMPAIRED MEMBER OF THE GRAND JURY AN INTERPRETER OR  
6 ASSISTANT TO HELP THAT PERSON MAY BE PRESENT IN THE GRAND JURY  
7 ROOM DURING THE VOTING. WHAT THAT MEANS IS EVEN THE COURT  
8 REPORTER AND THE GOVERNMENT LAWYER AREN'T ALLOWED AT SUCH  
9 POINT AS YOU DECIDE TO VOTE.

10 NOW, ONE MINOR EXCEPTION. YOU MAY DISCLOSE MATTERS  
11 WHICH OCCUR BEFORE THE GRAND JURY TO ATTORNEYS FOR THE  
12 GOVERNMENT FOR USE BY THOSE ATTORNEYS IN THE PERFORMANCE OF  
13 THEIR DUTIES. EVEN WITH RESPECT TO THE GOVERNMENT LAWYERS,  
14 YOU MAY NOT DISCLOSE THE CONTENTS OF YOUR DELIBERATION AND THE  
15 VOTE OF ANY JUROR. SO THE GOVERNMENT LAWYERS ARE NEVER TO  
16 KNOW WHICH OF YOU VOTED WHICH WAY, WHICH OF YOU VOTED THE  
17 OTHER WAY, OR WHAT WAS THE SUBJECT MATTER OF THE  
18 DELIBERATIONS. THOSE ARE MATTERS THAT ARE EXCLUSIVELY WITHIN  
19 YOUR PROVINCE.

20 LET ME CONCLUDE BY SAYING THAT THIS IS A VERY  
21 IMPORTANT SERVICE THAT YOU HAVE UNDERTAKEN. IT'S DEMONSTRATED  
22 BY THE VERY COMPREHENSIVE INSTRUCTIONS I'VE GIVEN. IT'S  
23 DEMONSTRATED ALSO BY THE IMPORTANT OATH THAT YOU TOOK JUST A  
24 SHORT WHILE AGO. THE OATH OF THE GRAND JURY IS ROOTED IN  
25 HISTORY, AND THOUSANDS OF YOUR FOREBEARERS HAVE TAKEN A

1 SIMILAR OATH. AS GOOD CITIZENS, YOU SHOULD BE PROUD TO HAVE  
2 BEEN SELECTED TO ASSIST WITH THE ADMINISTRATION OF THE  
3 AMERICAN SYSTEM OF JUSTICE.

4 THAT AND THIS, TOO: IT'S BEEN MY GREAT PLEASURE TO  
5 HAVE MET ALL OF YOU. I LOOK FORWARD TO SEEING YOU AROUND THE  
6 GROUNDS, AS THEY SAY. AT THIS POINT, IT CONCLUDES THE COURT'S  
7 FUNCTION.

8 DOES IT NOT?

9 THE CLERK: YES.

10 THE COURT: SO I'M DONE. I'M GOING TO TURN YOU OVER  
11 TO THE GOVERNMENT LAWYER, MR. WHEAT, WHO WILL ASSIST YOU IN  
12 GETTING ORGANIZED AND GIVE YOU SOME MORE INFORMATION.

13 AGAIN, NICE MEETING ALL OF YOU. HAVE A WONDERFUL  
14 WEEKEND.

15 --000--

16 I HEREBY CERTIFY THAT THE TESTIMONY  
17 ADDUCED IN THE FOREGOING MATTER IS  
18 A TRUE RECORD OF SAID PROCEEDINGS.

19  
20 S/EVA OEMICK

10-15-07

21 EVA OEMICK  
22 OFFICIAL COURT REPORTER

DATE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 08CR1969-JM
v.	)	
	)	CERTIFICATE OF SERVICE
MANLEY SMITH (2),	)	
	)	
Defendant.	)	
_____	)	

Counsel for Defendant certifies that the foregoing pleading, is true and accurate to the best of his information and belief, and that a copy of the foregoing Defendant's Notice of Motions and Motions has been electronically served this day upon:

W. Mark Conover  
Assistant U.S. Attorney  
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Dated: July 15, 2008

/s/ Jason I. Ser  
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